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In The

Supreme Court of the United States

October Term, 1993

THE STATE OF TEXAS,

Petitioner,

v.

PRESIDING JUDGE OF THE
COUNTY CRIMINAL COURT NUMBER FOUR OF
TARRANT COUNTY, TEXAS,

Respondent.

Petition For A Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state legislature from mandating by statute that a state's uniform remedy for a *Batson* violation shall be to discharge the venire and call a new array.

(2) Whether a prospective juror has a right under the Equal Protection Clause of the Fourteenth Amendment to serve on the same jury from which he was peremptorily struck in violation of *Batson*.

LIST OF PARTIES

(1) The State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, Tim Curry;

(2) The Presiding Judge of the County Criminal Court Number Four of Tarrant County, Texas, the Honorable Wallace Bowman;

(3) Steven Patrick Post, defendant in *State of Texas v. Steven Patrick Post*, No. 0426042, in County Criminal Court Number Four of Tarrant County, Texas.

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THE STATE OF TEXAS,

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PRESIDING JUDGE OF THE
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Petition For A Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals is styled *Ex rel. Curry v. Bowman*, No. 71,606 (Tex. Crim. App. December 8, 1993). Though ordered published, it has not yet been reported. It is reproduced in the Appendix at A-1. There are no opinions from any lesser court.

JURISDICTION

The Texas Court of Criminal Appeals issued its opinion and judgment on December 8, 1993. The State timely filed a motion for rehearing on December 21, 1993. The Court of Criminal Appeals denied the motion on April 6, 1994. [Appendix A-2].

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

The Texas Code of Criminal Procedure Article 35.261:

> (a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.
>
> (b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon Supp. 1994).

STATEMENT OF THE CASE

A. The Proceedings Below.

On January 29, 1993, Respondent, as judge of the County Criminal Court Number Four of Tarrant County, Texas, called to trial the case of *State v. Steven Patrick Post*, No. 0426042. The defendant was charged with the offense of driving while intoxicated. During voir dire of the cause, the defendant posed a *Batson*[1] objection, contending that Petitioner, the State of Texas, had impermissibly exercised its peremptory strikes against two veniremen on the basis of the prospective jurors' race. [R. I-110-11]. Petitioner proffered several race-neutral justifications for its challenges. [R. I-111-16]. Ruling that Petitioner had not introduced the arrest record of one venireman and that the other venireman's prior experience with an intoxilyzer instrument was not sufficiently race neutral, Respondent sustained the objection and ordered the two stricken veniremen placed on the jury. [R. I-112-14, 116-17, 119].

Petitioner objected to Respondent's order, maintaining that "the only proper procedure" after a *Batson* objection is sustained is "to call a new array." [R. I-119-120]. Petitioner was relying on Article 35.261 of the Texas Code of Criminal Procedure, which requires a trial court to quash the venirepanel and call a new array after finding that the State has exercised its peremptory challenges "for the purpose of excluding persons from the jury on the basis of their race." TEX. CODE CRIM. PROC. ANN.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

art. 35.261(b) (Vernon Supp. 1994). Respondent overruled the objection and impaneled the jury. [R. I-121-22].

Respondent initially sought a writ of mandamus from the Court of Appeals for the Second Court of Appeals District of Texas, but was denied leave to file its petition. Petitioner then sought a writ of mandamus from the Texas Court of Criminal Appeals, contending that Respondent's impaneling of the jury in contravention of Article 35.261 was void. The Court of Criminal Appeals granted Petitioner leave to file its petition, but ultimately denied Petitioner the relief it requested.

B. The Opinion Below.

In response to Petitioner's claim that Respondent's action of returning stricken veniremen to the jury had violated the mandatory terms of Article 35.261, the Court of Criminal Appeals acknowledged that the statute had been enacted "[t]o codify and implement *Batson* in Texas." The court opined, however, that the remedy prescribed by the statute "in view of the evolution of *Batson* . . . may be unconstitutionally restrictive." Relying upon *Georgia v. McCollum*[2] and *Powers v. Ohio*,[3] the court held that the calling of a new array, as mandated by the statute, did not constitute "a just and reasonable vindication of a prospective juror's right" to sit on a jury, and added that the remedy provided by the statute "may defeat the purpose" of *Batson*, *Powers*, and *McCollum*.

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[2] *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348 (1993).

[3] *Powers v. Ohio*, 499 U.S. 400 (1991).

Since the statute could not vindicate the venireman's right, the court further reasoned, a *Batson* objection was not "coextensive with an objection predicated upon Article 35.261." The court then concluded that since the defendant's objection was outside the scope of Article 35.261, the trial court's failure to follow the statute was "consistent with *Batson* and its progeny" and would not be disturbed.

Without explicitly declaring the statute constitutionally invalid, the court's opinion effectively rendered it so. In light of the Court of Criminal Appeals' reasoning, a trial court's calling of a new array, even in the face of an express objection and request for relief solely under Article 35.261, would not represent a "just and reasonable vindication of a prospective juror's right" to sit on a jury and would "defeat the purpose" of *Batson*, and thus be invalid.

REASONS FOR GRANTING THE PETITION

Invoking the Equal Protection Clause of the Fourteenth Amendment, the Texas Court of Criminal Appeals has annulled the Texas legislature's choice of a uniform statutory remedy for *Batson* violations in Texas criminal courts. In passing Article 35.261, the Texas legislature weighed the competing interests posed by a successful *Batson* objection – the vindication of a prospective juror's interests as against the absolute impartiality of the jury – and mandated that the uniform remedy in the state's

criminal courts for a *Batson* violation was to be the dismissal of the array and the calling of a new venirepanel. But in the instant case, the Court of Criminal Appeals has declared that the federal constitution prohibits the Texas legislature from instituting the uniform remedy the legislature had chosen.

The question here is not whether one *Batson* remedy is better than another, or even whether, in the absence of legislative command, a state's highest court has authority to impose a uniform *Batson* remedy upon the trial courts of the state. Rather, the question is whether the federal constitution absolutely prohibits a state's democratically-elected representatives from weighing all the competing interests involved in a *Batson* violation and, in light of that state's particular circumstances and concerns, choosing the *Batson* remedy which the legislature deems most appropriate as a matter of state policy.

Thus, at the very heart of this case is a weighty constitutional issue: does the United States Constitution prohibit state legislatures from weighing the competing interests raised by a successful *Batson* objection (i.e., the vindication of a prospective juror's interests vs. the impartiality of the jury) and fashioning their own remedy as a matter of state policy? It is Petitioner's position that the Equal Protection Clause does not prohibit a state legislature from implementing by statute that the state's uniform remedy for a *Batson* violation shall be to discharge the venire and call a new array.

Furthermore, in holding that the quashing of an array and the calling of a new venirepanel does not constitute a

"just and reasonable vindication" of the rights of prospective veniremen, and, hence, is violative of *Georgia v. McCollum*, the Court of Criminal Appeals' decision conflicts with at least six other state court opinions on the issue and at least one federal court of appeals.

Given the inherent tension between the rights of prospective veniremen and the rights of litigants, the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is erroneous, and the issue that it addresses is important.

I. The Court of Criminal Appeals' Interpretation of *Georgia v. McCollum* Conflicts With the Decisions of Other State and Federal Courts Which Have Addressed This Issue.

At least six other state courts have either explicitly held that the calling of a new array is proper after a *Batson* objection or in dicta have suggested that such a ruling is either proper or preferred. *See State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144, 158-60 (1993), *petition for cert. filed*, No. 93-7200 (U.S. Dec. 17, 1993); *Gilchrist v. State*, 97 Md. App. 55, 627 A.2d 44, 54-55 (1992), *cert. granted*, 332 Md. 741, 633 A.2d 102 (Md. 1993); *State v. Alen*, 616 So.2d 452, 453-54 (Fla. 1993); *People v. Frye*, 191 A.D. 581, 595 N.Y.S.2d 84, 84-85 (1993), *leave to file appeal denied*, 81 N.Y.S.2d 1014, 600 N.Y.S.2d 202 (1993); *State v. Hood*, 242 Kan. 115, 744 P.2d 816, 822 (1987); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150, 1166-67 (1986). *See also United States v. Alvarado*, 891 F.2d 439, 445 (2d Cir.

1989), *vacated on other grounds*, 497 U.S. 543 (1990), *aff'd on remand*, 951 F.2d 22 (2d Cir. 1991).

In *State v. McCollum*, for example, the North Carolina Supreme Court faced much the same issue as did the Texas Court of Criminal Appeals. In *McCollum*, a capital murder defendant argued on appeal that the trial court had reversibly erred in refusing to seat veniremen who had been impermissibly struck by the prosecution in violation of *Batson*. *State v. McCollum*, 433 S.E.2d at 158. Rather than re-seat the veniremen on the jury, the trial court had quashed the array and called an entirely new venirepanel. *Id.* at 159.

The North Carolina Supreme Court affirmed the trial court's action, calling it the "better practice." *Id.* The court acknowledged that under *Powers v. Ohio*, a prospective juror "has a right not to be excluded from jury service on account of race," and that the venireman's right "is independent of the rights of a criminal defendant." *Id.* But the court opined that neither *Batson* nor *Powers* requires that the venireman be placed back on the jury panel after having been struck. *McCollum*, 433 S.E.2d at 159.

"The primary focus of a criminal case," the court reasoned, "must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State." *Id.* In light of that goal, the court observed:

> To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would be to

> ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully.

Id. "As *Batson* violations will always occur at an early stage of the trial," the court concluded, "the simpler, and we think clearly the fairer, approach is to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation." *Id.*

The difference between the *McCollum* decision and the Court of Criminal Appeals' opinion in the present case stems from the courts' approaches to two different premises. First, the Texas court presumes that a prospective juror has a right to sit on the particular jury from which she was struck, which leads the court to conclude that calling a new array "is not a just and reasonable vindication" of that right. *See Ex rel. Curry v. Bowman*, No. 71,606, slip op. at 6. In contrast, the North Carolina court notes that a venireman has only "a right not to be excluded from jury service on account of race." *See State v. McCollum*, 433 S.E.2d at 159.

The distinction is not without significance, and lies in the conduct which is focused upon. Framing a *Batson* violation as the violation of a venireman's right not to be peremptorily challenged on account of race concentrates on the actual exercise of the challenge by a party to the litigation. *See Georgia v. McCollum*, ___ U.S. at ___, 112 S.Ct. at 2359 ("We therefore reaffirm today that the *exercise of a peremptory challenge* must not be based on either the race of the juror or the racial stereotypes held by the

party"). A violation of an individual's right not to be excluded on account of race may be vindicated through means which punish or otherwise chastise the offender, and may include sanctions, fines, or the calling of a new array, since the object is to punish the action of the improper exercise of a peremptory challenge. *See Powers v. Ohio*, 499 U.S. at 409 ("An individual juror does not have a right to sit on any particular jury, but he or she does possess the right not to be excluded from one on account of race").

In contrast, the violation of an individual's purported right to sit on a particular petit jury, since it focuses on the actual physical exclusion of the venireman, can be vindicated **only** by placing the individual on the jury panel. One problem with such an approach arises not when the trial court makes a finding of illegal discrimination at trial, but when the trial court mistakenly finds that no *Batson* violation exists. If the venireman possesses the right to sit on the jury, and not simply a right not to be struck for racial reasons, subsequent review by an appellate court will be insufficient to vindicate the venireman's right, since all the appellate court could do would be to order a new trial, and consequently, an entirely new array. Implicit in a holding that the venireman possesses the right to be seated on the jury in the event a *Batson* objection is sustained, then, is the requirement that *Batson* objections be reviewed on an interlocutory basis.

Neither *Powers* nor *Georgia v. McCollum* suggest that interlocutory review is necessary or proper to redress *Batson* violations. Nor do they imply that the stricken venireman must be placed on any subsequent jury called

in those causes.[4] Both cases merely provide standing to parties to raise *Batson* claims that they would not have been able to under the *Batson* decision itself. *See Georgia v. McCollum*, ___ U.S. at ___, 112 S.Ct. at 2357; *Powers v. Ohio*, 499 U.S. at 415. Neither, in short, stands for the proposition advanced by the Texas court in this case, namely, that a venireman has a right to sit on a jury.[5]

The second difference between the North Carolina decision and the Texas decision stems from the courts' contrasting positions as to the balance to be struck

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[4] Practically, either possibility would present overwhelming problems for trial courts to implement. A right to interlocutory appeal would essentially entitle a defendant to an automatic delay in *every* trial simply by the expedient of posing a *Batson* objection, no matter how spurious, and then appealing the trial court's ruling. Adding to the trial court's administrative nightmare, during the appeal process the trial court would necessarily have to keep close tabs on the veniremen involved in the case in order to reconstruct the venirepanel in the event the defendant's appeal is upheld.

Similarly, the conclusion that a previously stricken venireman must be placed on a subsequent jury called after the case has been reversed would at the very least cause insuperable administrative difficulties.

[5] Another danger inherent in the Court of Criminal Appeals' analysis is that a general right to sit on a jury, as opposed to a right not to be struck for specific, "invidious" reasons, does not limit the grounds upon which a *Batson* challenge may be advanced. Even this Court's recent opinion in *J.E.B. v. T.B.* does not posit such a sweeping contention. *See J.E.B. v. Alabama ex rel. T.B.*, ___ U.S. ___, 114 S.Ct. 1419, 1429 (1994). *See also Davis v. Minnesota*, 62 U.S.L.W. 3771 (U.S. May 23, 1994)(No. 93-6577)(Thomas, J. dissenting)(dissenting to Court's declining to review issue of whether *Batson* applies to strikes based upon a venireman's religion).

between obtaining an unbiased jury and enforcing *Batson*. The North Carolina court notes the difficulty – the "near superhuman effort" – required of a stricken venireman to put aside any prejudice engendered by the peremptory challenge. Based upon the danger of a formerly-stricken venireman being unable to compartmentalize any resentment which he might feel, and the overriding importance of an impartial finder of fact, the *McCollum* court concludes that in order to ensure an unbiased jury, a new array should be called. *See State v. McCollum*, 433 S.E.2d at 159.

The Texas Court of Criminal Appeals, in contrast, promotes the "interest" of the individual venireman over the process as a whole. Concluding the venireman has a right to sit on a jury, the court weighs this right as being greater than society's interest in a panel unaffected by outside influences. *See Ex rel. Curry v. Bowman*, No. 71,606, slip op. at 6.[6] But nothing in *Batson* or its progeny

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[6] The possibility that the panel may be tainted is very real. As this court has observed, a wrongful challenge by a party

> is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case. [citations omitted]. The influence of the voir dire process may persist through the whole course of the trial proceedings.

Powers v. Ohio, 400 U.S. at 412. In Texas, a trial court does not abuse its discretion in refusing to allow a party to explain his challenges for cause outside the presence of the venirepanel. *Camacho v. State*, 864 S.W.2d 524, 531 (Tex. Crim. App. 1993).

suggests that such a balance is constitutionally mandated. And nothing in *Batson* and its progeny suggests that a state legislature is prohibited from striking a balance between competing interests by fashioning, as a matter of state policy, a *Batson* remedy which punishes the offending party yet preserves the jury's impartiality.

Moreover, the Court of Criminal Appeals' promotion of the venireman's right over all other interests may have serious repercussions when a *Batson* objection has been posed against a defendant rather than against the State. A defendant, unlike the prosecution, possesses an absolute right to an unbiased jury. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (a criminally accused has right to trial "by a panel of impartial, 'indifferent' jurors"). While a valid *Batson* violation may waive such a right, at least insofar as a jury tainted by the violation is concerned, *see Rowe v. State*, 625 So.2d 1210, 1213 (Ala. Crim. App. 1993), such a conclusion is in no way mandated by prior Sixth Amendment interpretation. Furthermore, such a "waiver" will always be susceptible to attack on the basis of ineffective assistance of counsel.

In addition, in contrast to re-seating stricken veniremen, calling a new array does not create potential Sixth Amendment problems in the event the trial court erroneously sustains a *Batson* objection lodged against a defendant. If a *Batson* objection against a defendant is sustained by the trial court, the stricken veniremen are placed on the venirepanel, and the *Batson* objection is overruled on appeal, the defendant would be entitled to a new trial on the grounds that his Sixth Amendment right to an unbiased jury, as well as his statutory right to a peremptory strike, had been violated.

In contrast, calling a new array upon the sustaining of a *Batson* objection would not be violative a defendant's Sixth Amendment right, regardless of the propriety of the trial court's *Batson* ruling. Since a defendant has no vested right to any particular jury, but only to one capable of impartiality, calling a new array would provide the very relief which the defendant would seek on appeal, i.e., a new array, without the attendant danger of trying the accused before a potentially biased jury. *See State v. McCollum*, 433 S.E.2d at 159-60. *See also Gilchrist v. State*, 627 A.2d at 55.

The decision below therefore contradicts a number of state and federal court holdings, particularly the decision of the North Carolina Supreme Court in *State v. McCollum*. The Court should grant certiorari to review these important conflicts and to resolve the uncertainty engendered by those conflicts.

II. The Decision of the Court of Criminal Appeals Is Erroneous.

As Petitioner has already suggested, the Texas Court of Criminal Appeals' decision is incorrect because it is based upon the conclusion that a prospective juror possesses a right to sit on the petit jury. The court declares: "Dismissing an array is not a just and reasonable vindication of a prospective juror's right who, but for the use of an [sic] peremptory challenge in violation of the Equal Protection Clause of the Fourteenth Amendment, would have served." *Curry v. Bowman*, No. 71,606, slip op. at 6. The only authority cited by the court in support of its proposition, however, was this Court's decisions in

Powers v. Ohio and *Georgia v. McCollum*, which, as Petitioner has argued, utterly fail to support the Court of Criminal Appeals' conclusion. *See Curry v. Bowman*, No. 71,606, slip op. at 4.

Respondent's reliance upon *Powers* and *Georgia v. McCollum* is misplaced. Neither case holds that a venireman has a right to serve on any particular jury, and in fact each specifically disavows such a conclusion. Moreover, such an interpretation turns the holdings in these cases upside down.

First, the precise question before the *Powers* and *Georgia v. McCollum* courts was whether, respectively, a criminal defendant and the prosecution have standing to raise the equal protection rights of a juror excluded from jury service in violation of the principles announced in *Batson*. *Georgia v. McCollum*, ___ U.S. at ___, 112 S.Ct. at 2357; *Powers v. Ohio*, 400 U.S. at 415. *See also Powers v. Ohio*, 499 U.S. at 426-31 (Scalia, J., dissenting). In recognizing that such standing existed, the Court did not concern itself with the appropriate remedy for a court's sustaining of a *Batson* objection.

Second, in conferring such standing on the parties, *Powers* also reaffirmed the proposition that the central evil or harm derived from a *Batson* violation is a defendant being tried by a tribunal from which members of a certain racial group have been excluded. *See Georgia v. McCollum*, ___ U.S. at ___, 112 S.Ct. at 2354 ("just as public confidence in a criminal trial is undermined by a conviction in a trial where racial discrimination has

occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal"); *Powers v. Ohio*, 499 U.S. at 413-14.

Concomitant with this principle is the proposition that although a criminal defendant has standing to assert a juror's equal protection violation, the individual juror excluded does not have a right to sit on a particular jury, but only has a right to not be struck peremptorily on the basis of race: "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *McCollum v. Georgia*, ___ U.S. at ___, 112 S.Ct. 2353 (quoting *Powers v. Ohio*, 499 U.S. at 409). *See also J.E.B. v. Alabama ex rel. T.B.*, ___ U.S. at ___, 114 S.Ct. at 1429. *See also Batson v. Kentucky*, 476 U.S. at 99 n.24 (suggesting that one method of providing relief was to "discharge the venire and select a new jury from a panel not previously associated with the case"). Thus, the only vicarious right a party may assert is a wrongful peremptory challenge; a party may not assert a venireman's right to be seated on the jury for the simple reason that the venireman has no such right. *See J.E.B. v. T.B.*, ___ U.S. at ___, 114 S.Ct. at 1429; *Powers v. Ohio*, 499 U.S. at 409.

The Court of Criminal Appeals incorrectly determined that a venireman possesses a constitutional right to sit on a particular petit jury, and premised its rejection of a mandatory state statute on the statute's purported restriction of that right. The court erred in its determination, and erred in its conclusion based upon its mistaken premise, and thus this Court should grant certiorari to correct the lower court's plain error.

III. The Questions Presented Are Important.

The conclusions of the Court of Criminal Appeals and the North Carolina Supreme Court are polar opposites on an important issue that must be resolved. If the Texas court is correct, then the rights of the veniremen in those jurisdictions in which a trial court is authorized to call a new array after a *Batson* violation are being consistently violated. If, on the other hand, the North Carolina court is correct, then the highest criminal court in Texas, on a theory which is constitutionally incorrect, has invalidated a statute designed to provide what is arguably the "clearly fairer" and "simpler" approach to remedying *Batson* violations. *See State v. McCollum*, 433 S.W.2d at 159; *Hill v. State*, 827 S.W.2d 860, 863-64 (Tex. Crim. App. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 297 (1992) (legislative history of Article 35.261 reveals statute designed "to eliminate any possible bias toward the State which might exist if the remedy were to be to seat a venireman whom the State had struck").

IV. The Challenged Texas Decision Is Not Based On An Adequate and Independent State Ground.

In its decision in *Bowman*, the Texas Court of Criminal Appeals voided a Texas statute based solely upon that court's interpretation of the federal constitution. The opinion in *Ex rel. Curry v. Bowman* "fairly appears to rest primarily on federal law" and not only is the "adequacy and independence of any possible state law ground . . . not clear from the face of the opinion," *e.g.*, *Montana v. Hall*, 481 U.S. 400, 403 n.3 (1987), there are no state law grounds underlying the decision at all. The Court of

Criminal Appeals' opinion relies exclusively upon this Court's later interpretations of *Batson*, and specifically holds that Respondent's ruling was required under the purportedly more expansive remedy of *Batson* and its progeny rather than the remedy mandated by state statute. *See Ex rel. Curry v. Bowman*, No. 71,606, slip op. at 4-6.

Petitioner can say with confidence that there is no state court decision involving the issue of the adequacy of the *Batson* remedy mandated by the legislature in Article 35.261 in which a Texas court has made a "plain statement" under *Michigan v. Long* that the opinion was grounded solely in Texas state law. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

CONCLUSION

In sum, the Texas legislature enacted Article 35.261 of the Texas Code of Criminal Procedure to provide for procedural uniformity in Texas courts by mandating an exclusive statutory remedy for *Batson* violations. In the name of the Equal Protection Clause of the Fourteenth Amendment, the Texas Court of Criminal Appeals has thwarted that legislative purpose by voiding the statute based solely upon the court's interpretation of the federal constitution.

The Court of Criminal Appeals' decision is erroneous and conflicts with the opinions of several high courts of other jurisdictions regarding the requirements of *Batson*. Thus, the courts are in substantial disarray on a matter of great importance to the courts and individual court participants, including all jurors and prospective jurors. This

case presents a rare opportunity for this Court to address the question of a state legislature's right to provide a proper remedy for a *Batson* violation, and to bring uniformity and guidance to this area. Therefore, the Court should grant the petition.

Respectfully submitted,

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APPENDIX

THE STATE OF TEXAS EX REL. TIM CURRY, CRIMINAL DISTRICT ATTORNEY FOR TARRANT COUNTY, RELATOR

NO. 71,606 V.

HON. WALLACE BOWMAN, JUDGE COUNTY CRIMINAL COURT NUMBER FOUR OF TARRANT COUNTY, RESPONDENT

Original Application for Writ of Mandamus and Writ of Prohibition

OPINION ON ORIGINAL APPLICATION FOR WRIT OF MANDAMUS AND ORIGINAL APPLICATION FOR WRIT OF PROHIBITION

This is a writ of mandamus and prohibition action filed by Tim Curry, Criminal District Attorney of Tarrant County, seeking this Court to compel the Honorable Wallace Bowman, Judge of County Criminal Court Number Four of Tarrant County, to comply with the mandates of Article 35.261 of the Texas Code of Criminal Procedure. The State (hereinafter the relator) moved for a mistrial after Judge Bowman (hereinafter the respondent) granted the defendant's *Batson*[1] motion and ordered two of the struck veniremembers reinstated on the panel to serve as

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

jurors. Relator asks that the array be dismissed and a new array called pursuant to Article 35.261.[2]

We are requested to resolve whether the prosecution is entitled to, as a remedy, the dismissal of the array pursuant to Article 35.261 when a defense *Batson* motion has been sustained and the defendant acquiesces to a remedy other than that prescribed in Article 35.261(b). We are also requested to resolve whether in this case, where the trial court denied dismissal of the array, there was a violation of the prosecution's right to exercise its peremptory challenges pursuant to Article 35.15.

PERTINENT FACTS

On January 29, 1993, the parties were engaged in the jury selection of cause number 0426042, wherein the

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[2] Article 35.261 provides in part:

(a) After the parties have delivered their lists to the clerk . . . and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. . . .

(b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

defendant was accused of driving while intoxicated. After completing voir dire and after both sides exercised their peremptory strikes, the defendant made a *Batson* motion alleging that relator had exercised its peremptory strikes against three veniremembers based solely upon the veniremembers' race and requested that respondent quash the panel or disallow the strikes.

Respondent conducted a *Batson* hearing and determined that relator had purposely discriminated against two of the three veniremembers. Respondent disallowed two of the strikes and based on his understanding of *Batson*, ordered the two veniremembers reinstated on the panel and seated them on the jury. Relator objected to this procedure and asserted that Article 35.261 mandates that the array should be dismissed and a new one be called. Respondent allowed the relator to use both of the voided strikes on other members of the array; however, relator declined, stating that none of the other veniremembers were unacceptable to the State. Over relator's objections, respondent impaneled the jury and ordered the parties to prepare for trial. The proceedings were then adjourned for the weekend.

Relator filed a previous mandamus action against respondent predicated upon the conduct which is the subject of the instant petition in the Second Court of Appeals. The Second Court of Appeals stayed the proceeding, ordered pleadings filed and set a hearing. However, a week prior to the hearing, it withdrew its order as improvidently granted and dismissed the relator's petition and vacated the stay. This application was then filed.

Relator contends that he is entitled to a writ of mandamus compelling respondent to vacate his order reinstating the jurors on the jury because respondent violated his legal duty under Article 35.261. Relator argues that once a *Batson* motion is sustained it is mandatory pursuant to Article 35.261 that respondent dismiss the array and begin with a new panel. Relator further contends that respondent's order was violative of another mandatory statute, Article 35.15(c),[3] because reinstating the stricken veniremembers on the jury denied the State its minimum number of strikes. Finally, Relator contends that the State may not be limited to any less than the three peremptory strikes allowed by law under any circumstances.

MANDAMUS

In order to be entitled to the extraordinary relief of mandamus, the relator must establish two essential requirements: (1) that the act sought to be compelled is ministerial as opposed to discretionary and (2) no other adequate remedy at law is available. *Stearnes v. Clinton*, 780 S.W.2d 216, 219 (Tex.Cr.App. 1989).

The primary concern in deciphering whether an act is ministerial " 'is whether the respondent had the authority' to do what is the subject of the complaint." *Id.* Citing *State ex rel. Thomas v. Banner*, 724 S.W.2d 81, 83 (Tex.Cr.App. 1987). In this instance, that act is to order

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[3] Article 35.15(c) provides in part:
(c) The State and the defendant shall each be entitled to five peremptory challenges in a misdemeanor tried in the district court and to three in the county court, or county court at law.

the struck venireperson reinstated on the panel and seated on the jury.

I. BATSON AND IT'S [sic] PROGENY

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the state's use of peremptory challenges to purposefully or deliberately exclude black persons from jury participation solely on account of their race. *Id.* at 86, 106 S.Ct. at 1717. Thereafter, the Supreme Court extended the focus of *Batson*, *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (holding that the Fourteenth Amendment protects every person against purely racially motivated exercise of peremptory challenges), civil litigants, *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (holding that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial), and to criminal defendants, *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348, ___ L.Ed.2d ___ (1993) (holding that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges).

Batson and its progeny recognized that *Batson* "was designed 'to serve multiple ends,' " only one of which was to protect individual defendants from discrimination in the selection of jurors. *Powers*, 111 S.Ct. at 1368. (citations omitted). As in *Powers* and *Edmonson*, the extension of Batson's proscriptions is to remedy the harm done to the "dignity of persons" and the "integrity of the courts." *McCollum, supra*, at 2353. The harm caused by a *Batson*

violation is inflicted not only upon the parties but the excluded juror and the entire community as well. "[I]f a court allows a juror to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it." *McCollum*, ___ U.S. ___, 112 S.Ct. at 2354. "In our heterogeneous society, policy as well as constitutional considerations militate against the divisive assumptions – as a per se rule – that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Id.* at 2359 (citations omitted). As a practical matter, the excluded juror has considerable barriers and little incentives to set in motion the arduous process needed to vindicate his own rights. *Powers*, ___ U.S. ___, 111 S.Ct. at 1372-73. A citizen, however, does not have the right to sit on a particular petit jury, but he or she does have the right not to be excluded from one in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1370; *Jacobs v. State*, 824 S.W.2d 563 (Tex.Cr.App. 1992) (Overstreet, J. dissenting).

II. THE REMEDY

In recognizing the discriminatory use of peremptory strikes, the Supreme Court in *Batson, supra*, did not prescribe a particular remedy but left it to state and federal trial courts to fashion their own remedy. The Court explained that, "[w]e express no view on whether it is more appropriate in a particular case, upon a finding of discrimination . . . for the trial court to discharge the venire and select a new jury from a panel not previously

associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." (Citations omitted) *Batson*, 476 U.S. at 100 n.24, 106 S.Ct. at 1725, n. 24.

To codify and implement *Batson* in Texas, the Legislature enacted Article 35.261, V.A.C.C.P. *Hill v. State*, 827 S.W.2d 860 (Tex.Cr.App. 1992) (citations omitted). At that time our legislature, having only *Batson* before it, addressed only the defendant's rights and elected that the sole remedy would be to discharge the jury and call a new array. We concluded the same. *Id.* However, in view of the evolution of *Batson* through recent opinions, it is evident that the remedy provided in section (b) of Article 35.261 and the cases supporting that section may be unconstitutionally restrictive.

In *Hill*, we found that the legislature chose this remedy to eliminate any possible bias against the State which might exist if the remedy were to seat a veniremember whom the State had just struck. *Id.* at 864. Yet, the same possibility of bias exist [sic] against defendants and was recognized by the Supreme Court in *McCollum*. There the Court held that the State is now entitled to raise a *Batson* motion against racial discrimination by the defendant. Were the State's access to a *Batson* claim our only concern, dismissing the array and calling a new one might be adequate. Our analysis, however, cannot stop there. The potential juror excluded by a racial generality suffers a profound personal humiliation heightened by its public character. *Powers, supra*, at 1372. *Batson* and its progeny demonstrate that denying a person participation on a jury – the quintessential governing body, on account of his

race unconstitutionally discriminates against the excluded juror. "Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same – in call cases, the juror is subjected to open and public racial discrimination." *McCollum*, ___ U.S. ___, 112 S.Ct. at 2353. Therefore, the evolving interpretations of *Batson* instruct that a *Batson* violation is not merely harmful to the parties involved but to the individual veniremember as well. If the only remedy is dismissal of the array, the affected veniremember is still not allowed to participate in the process. Indeed, the sole remedy of Article 35.261 may defeat the purpose of the protection.

Batson and its progeny "convincingly demonstrate the principle that race shall play *no* part in the jury selection process. The exclusion of minority citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Hill*, 827 S.W.2d at 873, (Baird, J., concurring) (citing *Batson*, 106 S.Ct. at 1716). (Emphasis in original).

The defendant in the instant action raised his objection based upon the equal protection rights of the excluded veniremembers. He did not expressly assert any statutory rights. The defendant stated:

> The [S]tate had three peremptory challenges and used all of their peremptory challenges on black males on the jury panel. And, I move that you quash the panel or otherwise disallow their strikes.

The defendant was not relying solely on Article 35.261 because the alternative relief requested is not available under the statute. The respondent did not refer to Article

35.261 in ruling upon the defendant's objection, but specifically asserted that his decision to sustain the defendant's objection and to reinstate the wrongfully excluded veniremembers was based solely upon his understanding of *Batson* and cases interpreting *Batson*.[4] Thus, an objection to an impermissible peremptory challenge of a veniremember based on *Batson* and its progeny is no longer coextensive with an objection predicated upon Article 35.261.

This Court has acknowledged that the interpretation of Article 35.261 should be "flexible" in response to evolving constitutional interpretations of *Batson*. *State v. Oliver*, 808 S.W.2d 492, 496 (Tex.Cr.App. 1991). Compliance with the Constitution of the United States was intended when Article 35.261 was enacted, Tex. Gov't Code Ann. § 311.021(1), and a just and reasonable result feasible of execution was intended. Tex. Gov't Code Ann. § 311.021(3) and (4). Dismissing an array is not a just and reasonable vindication of a prospective juror's right who, but for the use of an [sic] peremptory challenge in violation of the Equal Protection Clause of the Fourteenth Amendment, would have served on the jury.

We now hold that where a *Batson* claim is sustained the court may fashion a remedy in its discretion consistent with *Batson* and its progeny. Therefore, respondent's decision to reinstate the excluded veniremembers to the

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[4] The record reflects that the first time Article 35.261 was mentioned was by the state [sic], and this was only after the respondent had ruled and reinstated the improperly excluded veniremembers.

jury is consistent with our decision today and so will not be disturbed.

III. ARTICLE 35.15(c)

The import of Article 35.15(c) is that both parties shall not be limited to any less than their allocated peremptory challenges. Because of our disposition there is no need to reach the relator's concerns in 35.15(c).

IV. CONCLUSION

Given the evolution of *Batson* with the rulings of both the *McCollum* and *Powers* opinions, we find that respondent had discretion to fashion the remedy utilized in this case. Therefore, the State is not entitled to the mandamus relief that it requests. Accordingly, the relief requested is denied.

OVERSTREET, Judge

Delivered December 8, 1993
EN BANC
PUBLISH
White, J., dissent.
Meyers, J., not participating.

THE STATE OF TEXAS EX REL.
TIM CURRY, CRIMINAL DISTRICT ATTORNEY FOR TARRANT COUNTY, Relator

Original Application for Writ of Mandamus and Writ of Prohibition

NO. 71,606

HON. WALLACE BOWMAN, JUDGE COUNTY CRIMINAL COURT NUMBER FOUR OF TARRANT COUNTY, Respondent

DISSENTING OPINION

I agree that article 35.261 V.A.C.C.P., given the Supreme Court's decisions[1] expanding the original rule of *Batson*,[2] is partially obsolete as to facts that might arise in the selection of a jury, particularly where the defendant violates the *Batson* rule. However, under the facts of this case, the statute is workable and should be followed.

The State cites to us the case of *State v. McCollum*, ___ S.E.2d ___, 1993 WL 288302 (N.C. July 30, 1993). In that case a capital murder defendant argued on appeal that the trial court reversibly erred in refusing the [sic] seat a

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[1] *Powers v. Ohio*, 111 S.Ct. 1364 (1991); *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991); *Georgia v. McCollum*, 112 S.Ct. 2348 (1993).

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* held that it is a violation of the equal protection clause of the Fourteenth Amendment for the State to exercise a peremptory challenge against veniremembers solely on account of their race. *Id.* at 89. While a defendant has no right to a jury composed of members in whole or in part of persons of his own race, a "defendant does have the right to a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 85-86.

venireman who had been impermissibly struck in violation of *Batson*. Instead, the trial court dismissed the jury and called an entirely new venire panel. The North Carolina Supreme Court affirmed the trial court's actions, calling it "the better practice" and stating that neither *Batson* nor *Powers* requires that a venireman be placed back on the panel having been struck. The North Carolina Court reasoned "that the primary focus of a criminal case . . . must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State." *McCollum*, 1993 WL 288302 at 14.

In *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App. 1992), this Court articulated the purpose of article 35.261, and the Supreme Court of North Carolina's reasoning is consistent with that purpose:

> To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice towards either the state or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully.

McCollum, 1993 WL at 14; *see also Hill*, 827 S.W.2d at 864 (remedy of calling new array is to eliminate possibility of bias if struck venireman were to be reseated).

As pointed out in *Hill*, the reseating of a venireman discriminatorily struck was rejected by the legislature when it enacted 35.261; however, as stated above the

statute is now partially obsolete (albeit workable under the facts of this case). Even if we were to hold that the statute is completely obsolete in light of recent Supreme Court decisions, it seems to me that an attempt should be made to fashion a remedy that is consistent with such Supreme Court cases and with the legislative intent as expressed in the existing statute.

My bretheran [sic] believe that a vacuum now exists as to remedy and have attempted to fashion a solution. Hoping that the trial judges of this State in applying that solution continue to remember the primary focus of a criminal case, I regretfully dissent.

MALONEY, J.

Delivered December 8, 1993
Publish

McCormick, P.J. joins.

STATE OF TEXAS ex rel.
TIM CURRY, Criminal District Attorney for Tarrant County, Relator

NO. 71,606 v.

HONORABLE WALLACE BOWMAN, Judge County Criminal Court Number Four, Tarrant County, Respondent

Original Application for Writ of Mandamus and Writ of Prohibition

From Tarrant County

DISSENTING OPINION

In *Hill v. State*, we said the Legislature enacted Article 35.261, V.A.C.C.P., "to create uniform procedures and *remedies* to address claimed constitutional violations during jury selection." *Id.*, 827 S.W.2d 860, 864 (Tex.Cr.App. 1992). (Emphasis Supplied). We also said the Legislature elected to have the sole *remedy* [for a *Batson*[1] violation] to be the call of a new array as set out in Article 35.261(b), V.A.C.C.P., and this is the remedy the State requests we mandamus the trial court to provide in this case. *Hill*, 827 S.W.2d at 863-64. (Emphasis Supplied). The majority opinion, in effect, overrules *Hill* without expressly finding any constitutional infirmity in Article 35.261(b) but also stating the remedy in Article 35.261(b) "may be unconstitutionally restrictive."

To the extent Judge Overstreet's majority opinion suggests *Batson* and Article 35.261 confer similar but separate rights, I disagree. *Batson* confers a federal constitutional right to a defendant vicariously to assert the rights of veniremembers peremptorily excluded by the State on

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[1] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

the basis of race. The *Batson* court left it up to the individual States to fashion a remedy for a *Batson* violation. The Texas Legislature in Article 35.261(b) fashioned the sole remedy to a defendant for a *Batson* violation. See *Hill*, 827 S.W.2d at 863-64. The Legislature conferred no separate right under State law; it merely codified a *remedy* for the violation of a federal constitutional right conferred by *Batson*.

The majority also suggest the remedy in Article 35.261(b) may be unconstitutional because it does not redress the rights of those veniremembers the State peremptorily strikes on the basis of race. However, *Batson* only provides a defendant with standing to vicariously assert the rights of wrongfully excluded veniremembers. *Batson* left it up to the States to fashion remedies for *Batson* violations, and even suggested one appropriate remedy is the one found in Article 35.261(b). This remedy primarily is intended to benefit a defendant and to ensure a fair trial. See *Hill*, 827 S.W.2d at 864. I do not read *Batson* as requiring any particular remedy be provided to a wrongfully excluded veniremember, and I do not see any constitutional infirmity with the remedy chosen by the legislature in Article 35.261(b).

I would grant the mandamus relief.

McCormick, Presiding Judge

(Delivered December 8, 1993)
En Banc
Publish

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 6, 1994

OFFICIAL BUSINESS
STATE

COUNTY CRIMINAL COURT NO 4-046042

RE: Case No. 71,606
STYLE: STATE OF TEXAS, CURRY, TIM, EX REL, DISTRICT ATTORNE
v. HONORABLE WALLACE BOWMAN, JUDGE COUNTY CRIMINAL COUR
FOR PRIVATE USE

The Relator's Motion for Rehearing has this day been DENIED.

PRESIDING JUDGE MCCORMICK AND JUDGES WHITE & MALONEY WOULD GRANT.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

EDWARD L WILKINSON
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A-16